WHAT'S NEW IN THE FAQS: RECENT COMPETITION BUREAU GUIDANCE ON THE AMENDMENTS TO CANADA'S COMPETITION ACT

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Recent Competition Bureau Guidance on the Amendments to Canada's *Competition Act*

For those keeping score at home, the Canadian *Competition Act* has gone through three rounds of substantial amendments over the last couple of years, reflected in our various McMillan Bulletins.[1] In an effort to provide some early high level guidance, on November 7, 2024 the Competition Bureau released a Frequently Asked Questions (FAQ) document, providing preliminary guidance respecting some of the more consequential changes with respect to mergers and reviewable conduct. Further and more detailed guidance is expected from the Bureau in the coming months. In this Bulletin we provide some highlights of the FAQs for quick reference.

1. Mergers – Market Share Presumptions

The amendments created an entirely new (rebuttable) presumption of substantial anti-competitive effect where the concentration index (which is defined to mirror the definition of the Herfindahl-Hirschman Index (HHI) used by US and other international antitrust authorities)[2] increases by more than 100 points and when post merger concentration index will be at or above 1,800 points, or where the concentration index increases by more than 100 points and the merged firm's market share will exceed 30%.

The FAQs note that the Bureau's approach to the changes will include, amongst other things:

- Where one of the merged firms already has a large share the Bureau will be more focused than in the past on even small increases in market share.
- Mergers increasing market share/power in a buying market (sometimes call monopsony power) may be expected to attract increased attention.
- The Bureau will – and indeed as a practical matter already is – requiring the provision of market share data with merger filings and requests for Advance Ruling Certificates / No Action Letters.
- Falling below the market share presumptions of a substantial prevention or lessening of competition in

the Bureau's existing *Merger Enforcement Guidelines* will not be a "safe harbour", and neither will be failing to meet the new presumption thresholds – below-presumption transactions may nevertheless be subject to challenge, depending upon the facts.
- Rebutting the market share presumption is possible, but the greater the concentration the more difficult it will be.

The FAQs do not provide guidance on two matters of practical significance that will have to be dealt with in many cases. One is how to deal with cases where market share data is not available, or is highly disputed. This often arises when the market definition is in dispute. A second area where guidance would be welcome but is not provided relates to what sorts of information / arguments are likely to be meaningful to the Bureau when parties seek to rebut a presumption of substantial anti-competitive effects.

2. Merger Efficiencies

The amendments repealed the *Competition Act* provision which protected even anti-competitive mergers from challenge if they gave rise to offsetting efficiencies. The FAQs address whether the Bureau may still consider efficiencies generated by transaction in merger review:

- Efficiencies will play a much smaller role in merger review than they previously did.
- Efficiencies, or other market dynamics, which increase rivalry or limit market power may be relevant to whether competition is reduced substantially.

Interestingly, the FAQs do not address the question, which is often considered in other jurisdictions, of whether efficiencies which result in a lower price to consumers can "save" an otherwise anti-competitive merger.

3. Mergers – Labour Markets Issue

The amendments import explicit consideration of a merger's impact on labour markets into merger review. The FAQs note, accurately, that the Bureau already considers input (monopsony) issues in merger review, but that the amendments will result in a specific focus on labour inputs. They note that areas of particular concern may be competition for workers in a specific area (geographic or expertise) which may result in a negative impact on wages or other terms or conditions of employment. The FAQs also note that employment of fewer workers may also be seen as an anti-competitive effect, which in our view seems a strange view of the provision.

4. Abuse of Dominance – Two out of Three Ain't Bad, or is it?

The prior Abuse of Dominant Market Position (monopolization) provisions required that to make an order the Competition Tribunal had to find these things:

i. That the firm had dominance/market powers;
ii. that the firm had engaged in a practice of anti-competitive acts; and
iii. that the conduct had or was likely to result in a substantial prevention or lessening of competition.

This three-stage test is still required in order for the Competition Tribunal to order certain remedies: Administrative Monetary Penalties (AMPs); disgorgement of benefits received; and/or orders requiring disposition of assets or shares. However, for a pure cease and desist remedy, the amendments provide that dominance plus a practice of anti-competitive acts, or dominance plus substantial prevention or lessening of competition will be sufficient.

This change could have significant and perhaps counterproductive consequences – it might allow prohibition orders against anti-competitive acts with no impact on competition, or worse, it could permit orders in situations where a dominant firm may have substantially reduced competition by, for instance, producing a better product more cheaply, thereby out-competing rivals.

In this regard the FAQs provide some comfort,[3] as they note that while only having to prove two of three elements may allow the Bureau to act more quickly in some cases, its main goal will continue to be protection of the competitive process, and that its approach to assessing dominance has not changed.

5. Abuse of Dominance – Excessive Pricing

Another of the recent amendments adds a new example to the list of anti-competitive acts for the purposes of the Abuse of Dominance provision: "charging excessive and unfair selling prices". This is a bit of a departure for Canadian competition law which, unlike some systems elsewhere, has never adopted the concept of exploitative abuse of dominance – that is, use market power, legally obtained, to charge high prices.

The FAQs confirm that charging high prices alone, even by a dominant firm, will not constitute Abuse of Dominance in the Bureau's view, unless the high prices are charged in order to have negative effects on a competitor or competition, or have the effect of harming competition substantially.

The FAQs indicate that in the Bureau's view such cases are likely to be very rare, and will require a clear theory of how the pricing harms competition. One example of possible excessive and unfair pricing resulting in anti-competitive effect identified by the Bureau would be pricing at a level which is in effect a refusal to supply. As the FAQs note, the same conduct might also be challenged under section 75 of the *Competition Act*.

6. Section 90.1 Non-Criminal Agreements with Non-Competitors

Under the *Competition Act* certain types of agreements between competitors constitute criminal conspiracy / price-fixing. Other agreements between competitors, which do not rise to the criminal level, can be challenged

under the non-criminal section 90.1 of the *Competition Act*, if they are likely to result in a substantial prevention or lessening of competition. The amendments expanded section 90.1 to also capture agreements between non-competitors where a "significant purpose" of the agreement or part of the agreement is to prevent or lessen competition and the agreement substantially prevents or lessens competition.

Thus far, as we have discussed in previous bulletins, the Bureau's focus with respect to this amendment has been with respect to agreements relating to the use of real estate (such as restrictive covenants) particularly in the grocery store sector – but the provision is not limited to any particular type of agreement or sector.

This change to the *Competition Act* is potentially very far-reaching, as it could involve challenge to any type of agreement between any persons, and the focus need not be on the entire agreement, but only part of it. Consequently, guidance on the Bureau's enforcement approach is particularly valuable. In that regard the FAQs indicate:

- The Bureau will consider whether the agreement is likely to lead to a substantial prevention or lessening of competition as it has traditionally done – by determining whether as a result of the agreement a party or parties can exercise increased market power.
- In addition to restricting the use of real property, examples of the type of agreements which may implicate the new provision may include meeting or matching competition clauses / contracts referencing rivals, which require suppliers to "compensate" a purchaser if a competing purchaser lowers the price of re-sold goods.

As noted, any guidance respecting the potentially vastly expanded scope of agreements caught by section 90.1 is very welcome. Guidance which would be extremely valuable, but is not currently included in the FAQs, would address the type of agreements – not only by way of example, but conceptually – which are likely to attract challenge, and would also outline how the Bureau is likely to approach the "part" of the agreement provision, particularly as virtually all agreements are restrictive in some respects.

7. Section 90.1 – Efficiencies

Like with respect to mergers, section 90.1 contained a provision exempting agreements from challenge if they create efficiencies which exceed the negative effect on competition. This provision is removed by the amendments. The FAQs note, however, that while efficiencies will generally no longer be relevant to an asset of impact on competition, aspects of agreements which lead to efficiencies may create pro-competitive benefits / increase rivalry, and the Bureau will consider all relevant factors.

8. Environmental Collaboration

The amendments have created an entirely new provision which may exempt or "save" conduct from challenge

if an agreement is undertaken to protect the environment. In order to benefit from the provision the parties must apply for a certificate from the Competition Bureau, which certificate will be registered with the Tribunal and will apply for a period of up to ten years. The FAQs note that the application must be made before the agreement is entered into, will only be granted if the purpose is to protect the environment and if the agreement does not harm competition, and the certificate may be granted on conditions or terms deemed to be appropriate by the Bureau.

9. Refusal to Deal Changes – Quasi Right to Repair

The amendments have added a new provision that, in cases where the various requirements of the refusal to deal (section 75) provision are met, provides that firms may be required to supply a means of diagnosis or repair (including information/documentation, software, tools or parts).

The FAQs note that this right was largely covered under section 75 prior to the amendments, but the amendments may make it easier to get access to relevant intellectual property. The FAQs also note that trade secrets are not covered by this provision.

10. Private Party Challenges to Behaviour

Historically, private parties could bring lawsuits for damages resulting from breach of the criminal but not the civil provisions of the *Competition Act*. Over time affected persons have obtained the right to apply to the Competition Tribunal for leave to challenge some, but not all, of the civil provisions of the *Competition Act*, although not to obtain damages.

The amendments significantly expanded both the ability to challenge civil reviewable conduct by affected persons, and the remedies available. The amendments:

- Grant persons the right to challenge conduct under the abuse of dominance provisions, the civil agreements (section 90.1) provision, and the civil misleading advertising provisions.
- Amend the test for leave to bring an application to the Competition Tribunal so that leave may now be granted if the applicant is directly and substantially affected in only a part of its business, or if the Tribunal believes that it would be in the public interest to allow the application.[4]
- Provide that applicants will be able to seek a monetary award in an amount up to the benefit received as a result of the challenged conduct.

11. Bureau Priorities

The FAQs conclude by providing an indication of how the Bureau will prioritize cases it chooses to pursue, recognizing that the Bureau's resources are limited. The prioritization will include consideration of:

- How clearly the conduct is contrary to the provisions of the *Competition Act*.
- How important the products in issue are for Canadians and the Canadian economy.
- Whether marginalized / vulnerable Canadian affected.
- The size of the impact of the conduct.
- Whether there is a useful / important precedent that the case may establish.

Conclusion

As is clear from this summary of the Bureau's recent FAQs guidance, and as laid out in greater detail in our earlier Bulletins, a great deal has changed in Canada's competition law. It is likely that it will take considerable time to fully appreciate the implications of these changes. The guidance in the FAQs, and in the Bureau's other guidance documents which will be updated in the coming months, is of importance particularly until case law develops to flesh out these changes. As always, members of McMillan's competition and antitrust law group are very happy to explore specific questions with you whenever you wish.

[1] See our June 2024 bulletin, *Ready for Change? Bill C-59 Rewrites the Competition Playbook*, along with the 8 other McMillan bulletins since May 2022 cited within that bulletin detailing the various amendments.
[2] In any relevant market, the "concentration index" refers to the "sum of the squares of the market shares of the suppliers or customers". This corresponds with the US DOJ's definition of HHI as "calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers".
[3] Although, as noted below, since Abuse of Dominance can now be challenged by private parties, that comfort is limited.
[4] For the civil misleading advertising provision, the only test for leave is that it is in the public interest to grant leave.

By James Musgrove and Joshua Chad

A Cautionary Note